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*Plaintiffs' counsel*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

IN RE PACIFIC FERTILITY CENTER  
LITIGATION

Master Case No. 3:18-cv-01586-JSC

### This Document Relates to:

No. 3:18-cv-01586

(A,B., C,D., E,F., G,H., and I,J.)

**PLAINTIFFS' MOTION IN LIMINE NO. 9:  
MAINTAINING CONFIDENTIALITY OF  
THE PLAINTIFFS' IDENTITIES**

## Pretrial Hearing: April 29, 2021

Time: 2:00 p.m.

Judge: Hon. Jacqueline S. Corley

Place: Courtroom F, 15th Floor

Trial Date: May 20, 2021

## INTRODUCTION

The Court has repeatedly held that, given the sensitive and highly personal nature of the fertility services and attendant facts at issue in this case, Plaintiffs' need for anonymity supports protecting their identities from public disclosure. Plaintiffs request that the Court continue to seal the Plaintiffs' names and identifying information at trial.

While they have proceeded under pseudonyms to this point, Plaintiffs propose even narrower sealing of their identifying information at trial: using their first names alone throughout the trial, while redacting other identifying information (last names, birth dates and the like). Though it has not identified any prejudice this would cause, Chart has declined the proposal, expressing concern about the public right of access to trial. To alleviate any concerns, Plaintiffs propose disclosing their full names to potential and empaneled jurors so that any potential conflicts could be identified, but Plaintiffs would request that the Court instruct the jurors not to share Plaintiffs' identities with anyone and order that their full names and other identifying information remain sealed.

For these reasons, as well as those described below, Plaintiffs move the Court to continue to allow them to proceed without disclosing their full names to the public and maintain their other identifying information under seal.

## ARGUMENT

While “[p]laintiffs’ use of fictitious names runs afoul of the public’s common law right of access to judicial proceedings,” courts “[i]n this circuit . . . allow parties to use pseudonyms” when “necessary . . . to protect [them] from harassment, injury, ridicule or personal embarrassment.” *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067-68 (9th Cir. 2000). “[A] party may preserve his or her anonymity in judicial proceedings in special circumstances when the party’s need for anonymity outweighs prejudice to the opposing party and the public’s interest in knowing the party’s identity.” *Id.* at 1068. Courts “have permitted plaintiffs to use pseudonyms in three situations,” including “when identification creates a risk of retaliatory physical or mental harm,” and “when anonymity is necessary to preserve privacy in a matter of [a] sensitive and highly personal nature.” *Id.* at 1068 (internal quotation omitted); *see also Jane Roes 1-2 v. SFBSC Mgmt., LLC*, 77 F. Supp. 3d 990, 993 (N.D. Cal. 2015). “The most compelling situations” for allowing a party to proceed anonymously

1 “involve matters which are highly sensitive, such as social stigmatization.” *Doe v. Rostker*, 89 F.R.D.  
 2 158, 162 (N.D. Cal. 1981). Consequently, “courts have often allowed parties to use pseudonyms when  
 3 a case involves topics” relating to “human sexuality.” *SFBSC Mgmt.*, 77 F. Supp. at 994.

4       **A. Privacy and Social Stigma**

5       As the Court has previously concluded, Plaintiffs hold reasonable concerns about their privacy  
 6 given the sensitive and highly personal nature of the fertility services at issue in this case. In addition  
 7 to testimony about their fertility diagnoses and procedures, Plaintiffs have been deposed about a range  
 8 of other highly sensitive and personal issues pertaining to sexuality and mental health, including birth  
 9 control (A.B. Dep. at 88), miscarriage (C.D. Dep. at 50-51; I.J. Dep. at 38:17-39:8), their mental health  
 10 histories (A.B. Dep. at 55-56; E.F. Dep. at 126), their families’ mental health histories (E.F. Dep. at  
 11 33), abortion (G.H. Dep. at 20), sexually transmitted disease diagnoses (G.H. Dep. at 30), and the  
 12 frequency with which one plaintiff and her husband are physically intimate (I.J. Dep. at 42, 88). All of  
 13 these topics implicate legitimate privacy concerns and are firmly within the realm of information  
 14 which courts in this circuit have routinely held justify proceeding anonymously. *SFBSC Mgmt.*, 77 F.  
 15 Supp. 3d at 992 (risk of social stigma from exotic dancing justifies proceeding anonymously); *Doe v.*  
 16 *United Serv. Life Ins. Co.*, 123 F.R.D. 437 (S.D.N.Y. 1988) (sexual orientation); *Doe v. Deschamps*,  
 17 64 F.R.D. 652 (D. Mont. 1974) (abortion; collecting older cases).

18       **B. Prejudice to the Opposing Party**

19       Chart will suffer no prejudice if Plaintiffs are allowed to continue to proceed anonymously at  
 20 trial. On April 5, 2021, Plaintiffs wrote to Chart to propose using the “Plaintiffs’ first names throughout  
 21 the trial” while still “redacting their last names, medical numbers, birth dates, and similar information  
 22 (consistent with the District’s existing guidance ...) from the trial exhibits.” See Exhibit \_\_ (April 5,  
 23 2021 email from Amy M. Zeman to Kevin Ringel). Chart rejected this proposal, expressing concern  
 24 about the right of public access to trial, but identifying no prejudice that would arise from protecting  
 25 Plaintiffs’ anonymity.

26       **C. Public Interest in Public Proceedings**

27       Although the public has a general interest in court proceedings, the public has very little interest  
 28 in knowing both the first and last names of the plaintiffs in this case. The relevant inquiry is whether

1 “the plaintiffs’ proceeding anonymously would actually bar public scrutiny of this case’s operative  
 2 issues.” *SFBSC Mgmt.*, 77 F. Supp. 3d at 996-997.<sup>1</sup> In this products liability case, anonymity would be  
 3 little if any obstacle to public scrutiny, because the operative issues mainly relate to whether Chart’s  
 4 product was defective. “[T]he public’s interest in the case was not best served by requiring that the  
 5 litigants reveal their identities,’ because here, ‘party anonymity did not significantly obstruct the  
 6 public’s view of issues joined or the court’s performance in resolving them.”” *Doe v. Ayers*, 789 F.3d  
 7 944, 946 (9th Cir. 2015) (quoting *Advanced Textile*, 214 F.3d at 1068). Just as in *Doe v. Ayers*,  
 8 “[a]lthough the public does not know [Plaintiffs’] name[s], any reader of the Federal Reporter may  
 9 consider the evidence . . . and determine for himself whether our assessment of its strength was  
 10 correct.” *Id.*; see also *Advanced Textile*, 214 F.3d at 1073, n.15 (“we fail to see[] how disguising  
 11 plaintiffs’ identities will obstruct public scrutiny of the important issues in this case. . . . For instance,  
 12 the question whether there is a constitutional right to abortion is of immense public interest, but the  
 13 public did not suffer by not knowing the plaintiff’s true name in *Roe v. Wade*.”).

#### 14       D. Plaintiffs’ Proposal is Narrowly Tailored

15       The Court has allowed the Plaintiffs to proceed under pseudonyms thus far in this litigation. In  
 16 its March 4, 2019 Sealing Order, the Court granted Plaintiffs’ motion to seal the portions of the record  
 17 which identified Plaintiffs by name. (Dkt. No. 189 at 1). In its next order addressing the issue, the Court  
 18 granted Plaintiffs’ request that their names be sealed, explaining that it was “narrowly tailored.” (Dkt.  
 19 No. 404 at 3). In its most recent, February 18, 2021, order addressing motions to seal, the Court again  
 20 described Plaintiffs’ requests as “narrowly tailored” and granted their motion to keep their identities out  
 21 of the public record. (Dkt. No. 691 at 2-3). Plaintiffs recognize that the public interest in open  
 22 proceedings is at its peak at trial, and their proposal for anonymity at trial is even more narrowly  
 23 tailored than the previous requests the Court has granted: they propose to proceed using only their real  
 24 first names, without a last name referenced.

25       Here, as before, the Plaintiffs’ need for anonymity outweighs the nonexistent prejudice to Chart  
 26 and the public’s modest interest in knowing the Plaintiffs’ identities, and Plaintiffs’ proposal is

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27  
 28 <sup>1</sup> As noted above, Plaintiffs’ consent to have their full names used so long as that information remains  
 sealed.

1 consistent with controlling Ninth Circuit authority. *See Advanced Textile*, 214 F.3d at 1068-69. Even if  
2 the public has a greater interest at trial than at previous stages of the litigation, Plaintiffs' proposal to  
3 reveal their first names more than satisfies the need for a narrow tailoring. The Court should once again  
4 allow Plaintiffs to preserve their anonymity.

5 **CONCLUSION**

6 Plaintiffs respectfully request that the Court order that Plaintiffs may proceed at trial using only  
7 their first names, and that Plaintiffs' last names, medical numbers, birth dates, and similar information  
8 remain under seal.

9  
10 Dated: April 14, 2021

Respectfully submitted,

11 By: /s/ Amy M. Zeman

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

IN RE PACIFIC FERTILITY CENTER  
LITIGATION

Case No. 3:18-cv-01586-JSC

DEFENDANT CHART INC.'S  
OPPOSITION TO PLAINTIFFS'  
MOTION IN LIMINE NO. 9:  
MAINTAINING CONFIDENTIALITY  
OF THE PLAINTIFFS' IDENTITIES

Hearing: April 29, 2021  
Time: 2:00 p.m.  
Judge: Hon. Jacqueline Scott Corley  
Place: Courtroom F, 15th Floor  
Trial: May 20, 2021

1      **I. INTRODUCTION**

2      On April 9, 2021, Plaintiffs submitted their motion *in limine* No. 9, requesting the Court to  
 3 continue to seal their names and identifying information at trial. In their motion, Plaintiffs  
 4 acknowledge the public interest in open proceedings “is at its peak at trial[.]” (Pls. MIL No. 9 at  
 5 3:21-22.) Chart agrees, and objects to Plaintiffs’ request. It is Plaintiffs’ burden to prove they  
 6 should be allowed to proceed at trial anonymously. This is an extraordinary request. They have  
 7 not met their burden under the factors and standards established by the Ninth Circuit, and their  
 8 “narrowly tailored” proposal to use only their first names and last initial does not cure the  
 9 deficiencies in their argument. Plaintiffs’ motion should be denied.

10     **II. ARGUMENT**

11     **1. Pertinent legal standards.**

12     “Plaintiffs’ use of fictitious names runs afoul of the public’s common law right of access  
 13 to judicial proceedings[.]” *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th  
 14 Cir. 2000) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598–99 (1978)). In the  
 15 Ninth Circuit, “the common law rights of access to the courts and judicial records are not taken  
 16 lightly.” *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Est.*, 596 F.3d 1036, 1042 (9th Cir.  
 17 2010). Where a court seals a plaintiff’s identity early in the case during pretrial proceedings, “the  
 18 interests weighing in favor of open judicial proceedings may change as the litigation progresses.”  
 19 *Advanced Textile Corp.*, 214 F.3d at 1069 (holding a district court should use its powers under  
 20 Fed. R. Civ. P. 16 and 26 to manage *pretrial* proceedings and issue protective orders limiting  
 21 disclosure where plaintiffs have demonstrated a need for anonymity). However, the presumption  
 22 in litigation is that parties must use their real names, based on the public’s right to open courts and  
 23 the right of private individuals to confront their accusers. *Kamehameha Schools/Bernice Pauahi*  
 24 *Bishop Estate*, 596 F.3d at 1042.

25     The strong presumption of public access and disclosure applies fully to dispositive motions  
 26 and trial. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (citing *Valley*  
 27 *Broadcasting Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1295 (9th Cir. 1986), and finding the Ninth  
 28 Circuit “adopted this principle of disclosure because the resolution of a dispute on the merits,

1 whether by trial or summary judgment, is at the heart of the interest in ensuring the ‘public’s  
 2 understanding of the judicial process and of significant public events.””). For this reason, “[t]he  
 3 party seeking anonymity has the burden of proving it should be allowed to proceed anonymously.”  
 4 *A.G. v. Unum Life Ins. Co. of Am.*, No. 3:17-CV-01414-HZ, 2018 WL 903463, at \*1 (D. Or. Feb.  
 5 14, 2018) (citing *United States v. Stoterau*, 524 F.3d 988, 1013 (9th Cir. 2008). To fulfill that  
 6 burden, Plaintiffs must show the following five factors weigh in favor of anonymity: (1) the  
 7 severity of a threatened harm; (2) the reasonableness of the anonymous party’s fears; (3) the  
 8 anonymous party’s vulnerability to such retaliation; (4) the precise prejudice at each stage of the  
 9 proceedings to the opposing party, and whether the proceedings may be structured so as to mitigate  
 10 that prejudice; and (5) whether the public interest would be best served by requiring that the  
 11 litigants reveal their identities. *A.G. v. Unum Life Ins. Co. of Am.*, No. 3:17-CV-01414-HZ, 2018  
 12 WL 903463, at \*2 (D. Or. Feb. 14, 2018) (citing *Advanced Textile Corp.*, 214 F.3d at 1069).

13 “Without sufficient special circumstances justifying the need for anonymity, Courts should  
 14 not deviate from the longstanding notion that ‘[t]he people have a right to know who is using their  
 15 courts.’” *Smith v. Corizon Healthcare*, No. 116CV00461DADEPGPC, 2016 WL 3538350, at \*2  
 16 (E.D. Cal. June 28, 2016), *report and recommendation adopted sub nom. Smith v. Healthcare*, No.  
 17 116CV00461DADEPG, 2016 WL 4679712 (E.D. Cal. Sept. 7, 2016) (citing *U.S. v. Stoterau*, 524  
 18 F.3d 988, 1012 (9th Cir. 2008).

19       **2. Plaintiffs have not overcome the presumption that the public interest  
 20 outweighs their privacy concerns.**

21 First, the Ninth Circuit has held that threat of physical harm is the paradigmatic case for  
 22 allowing anonymity, and “the two most important factors [are] severity of the [1] threatened harm  
 23 and [2] the reasonableness of the plaintiffs’ fears.” *Kamehameha Sch./Bernice Pauahi Bishop  
 24 Est.*, 596 F.3d at 1043 (affirming district court’s denial of Doe children’s request for anonymity,  
 25 even where there had been threats of physical violence against them, because the district court did  
 26 not err in finding the children’s fear was not objectively reasonable and, therefore, the remaining  
 27 factors did not tip the balance). Plaintiffs have presented no evidence to suggest they would be  
 28

1 subjected to threats, physical or otherwise, from using their full names at trial. Thus, this is not a  
 2 paradigmatic case for allowing anonymity.

3 Instead, Plaintiffs' argument largely relies the Court's permission thus far to proceed under  
 4 pseudonyms, and their purported embarrassment from their own medical histories as grounds to  
 5 maintain anonymity at trial. However, the weight permitting anonymity during discovery and  
 6 pretrial procedures does not apply equally at trial, *Kamakana*, 447 F.3d at 1179, and that "medical  
 7 records might include embarrassing or private information is not unusual and does not justify the  
 8 secrecy of anonymity. *E.L. v. Scottsdale Healthcare Corp. Health Plan*, No. 2:11-CV-00271-REJ,  
 9 2011 WL 1748548, at \*1 (D. Ariz. May 6, 2011).

10 Plaintiffs' legal analysis relies on *Jane Roes 1-2 v. SFBSC Mgmt., LLC*, which found "[t]his  
 11 district has thus considered 'social stigmatization' among the 'most compelling' reasons for  
 12 permitting anonymity." 77 F. Supp. 3d 990, 994 (N.D. Cal. 2015). However, unlike Plaintiffs'  
 13 request here, the *SFBSC Mgmt.* court was addressing pre-discovery requests by plaintiffs, who  
 14 were exotic dancers, to proceed at that stage under the "Jane Roe" pseudonym. *Id.* at 992. The  
 15 defendant agreed with plaintiffs, and the court found, that "public disclosure of an exotic dancer's  
 16 true identity presents substantial risk of harm." *Id.* at 995. Further unlike *SFBSC Mgmt.*, Plaintiffs  
 17 have failed to present any evidence they would face a substantial risk of harm or social stigma.  
 18 This is not an unusual case warranting anonymity.

19                   **a. Privacy and Social Stigma**

20 In their "privacy and social stigma" section, and as discussed above, Plaintiffs have  
 21 presented no objective basis showing they would be subjected to social stigma by proceeding at  
 22 trial under their full names. They cite one case from 1988, *United Serv. Life Ins. Co.*, 123 F.R.D.  
 23 437 (S.D.N.Y. 1988), which suggests that homosexuality could cause social stigma sufficient to  
 24 permit anonymity. They then cite a case from 1974, *Doe v. Deschamps*, which states "the intensely  
 25 personal nature of pregnancy does, we believe, create an unusual case" so as to permit the  
 26 anonymity of a pregnant plaintiff in a case "brought to test the constitutionality of Montana laws  
 27 regulating abortions." 64 F.R.D. 652, 653 (D. Mont. 1974). Neither of those case support an  
 28 argument that Plaintiffs' medical records are sufficiently stigmatizing in modern society to permit

1 anonymity at trial. Indeed, San Francisco, California, in the year 2021, is a far cry from New York  
 2 in 1988 or Montana in 1974, and the issues shown in Plaintiffs medical records are more likely  
 3 elicit sympathy than scorn.

4 Plaintiffs also suggest they have legitimate privacy concerns with respect to their medical  
 5 histories, which justifies proceeding anonymously. (Pls. MIL No. 9 at 2:12-14.) However, many  
 6 cases, including numerous medical malpractice lawsuits, also involve deeply personal information  
 7 about a plaintiffs' health, medical history, and sexual relationships, and those cases commonly  
 8 proceed at trial without the cloak of anonymity. *See E.L. v. Scottsdale Healthcare Corp. Health*  
*9 Plan*, No. 2:11-CV-00271-REJ, 2011 WL 1748548, at \*1 (D. Ariz. May 6, 2011) ("Disclosure of  
 10 medical records is part and parcel of judicial proceedings in many types of litigation, for example,  
 11 Social Security administrative reviews, medical malpractice litigation, and, as alleged here, ERISA  
 12 and welfare benefits claims. That the medical records might include embarrassing or private  
 13 information is not unusual and does not justify the secrecy of anonymity."); *Doe v. Blue Cross &*  
*14 Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997) ("fictitious names are allowed  
 15 when necessary to protect the privacy of children, rape victims, and other particularly vulnerable  
 16 parties or witnesses. But the fact that a case involves a medical issue is not a sufficient reason for  
 17 allowing the use of a fictitious name, even though many people are understandably secretive about  
 18 their medical problems.").

19 Finally, Plaintiffs list "topics" of issues in each of their medical histories that they consider  
 20 highly sensitive and personal. (*See* Pls. MIL No. 9 at 2:7-12.) These topics show each Plaintiff's  
 21 medical history is different from the next. While some of the topics may have been considered  
 22 highly sensitive at some place and some time sufficient to warrant anonymity (such as abortion in  
 23 Montana in 1974), the same cannot be said for each of these topics today. *See Corizon Healthcare*,  
*24* 2016 WL 3538350, at \*2 (rejecting plaintiff's request for anonymity and argument that the use of  
 25 his true identity exposes his psychiatric medical records and mental health condition "to the public  
 26 and fellow detainees, [which] will subject him to humiliation and embarrassment."). Thus,  
 27 Plaintiffs' request is unworkable in this case with multiple plaintiffs, where a court could  
 28 theoretically consider certain plaintiff's medical histories sufficiently sensitive to warrant

1 anonymity, but others are plainly not. Plaintiffs' suggested universal approach based on divergent  
 2 medical issues should be rejected on its face.

3                   **b. Prejudice to the Opposing Party**

4 In there "prejudice to the opposing party" section, Plaintiffs offer the unsupported assertion  
 5 that "Chart will suffer no prejudice if Plaintiffs are allowed to continue to proceed anonymously  
 6 at trial." (Pls. MIL No. 9 at 2:19-29.) However, "merely showing the absence of prejudice to a  
 7 defendant is insufficient for a plaintiff to meet his or her burden." *Unum Life Ins. Co. of Am.*, 2018  
 8 WL 903463, at \*4 (citing *Kamehameha*, 596 F.3d at 1043).

9 Plaintiffs' unsupported contention is also wrong. The jurors will need to know the  
 10 identities of the Plaintiffs for obvious reasons; namely, to determine if they know or recognize any  
 11 of the Plaintiffs (this may be especially true if Plaintiffs are wearing masks). If a juror knew or  
 12 knew of a Plaintiff, this could cause severe prejudice to Chart. Further, prejudice can derive from  
 13 the simple fact that Plaintiffs are allowed to remain anonymous. The "anonymous plaintiff"  
 14 circumstance provides an aura of concealment generally reserved for people against whom some  
 15 horrible wrong was committed, such as sexual assault victims. That in and of itself would be  
 16 prejudicial to Chart. The contention that a jury sitting at trial with anonymous plaintiffs will have  
 17 no prejudicial effect on the defendant is shortsighted.

18                   **c. Public Interest in Public Proceedings**

19 The presumption is that the public has an interest in the court proceedings because "the  
 20 people have a right to know who is using their courts." *Corizon Healthcare*, 2016 WL 3538350,  
 21 at \*2. Plaintiffs have not demonstrated a need for anonymity that outweighs that presumption.  
 22 Their assertion the public has very little interest in knowing the first and last names of the Plaintiffs  
 23 in this case is unsupported, defies the presumption, and is incorrect. First, this case is more than  
 24 just a products liability case related to whether Chart's product was defective and caused Plaintiffs'  
 25 damages. It involves a renowned cryopreservation fertility clinic (PFC) in San Francisco. Chart  
 26 submits that the public has great interest in this case and all of its actors. Second, permitting  
 27 anonymity *at trial* in this case would set poor guidance, and encourage any plaintiff who was  
 28 purportedly embarrassed of his or her medical history to fight for anonymity when it is

1 unwarranted. Finally, and perhaps most important, the strong principle of disclosure applies at its  
 2 fullest at trial because it helps ensure the public's understanding of the judicial process and of  
 3 significant public events. *Kamakana*, 447 F.3d at 1179.

4                   **d. Plaintiffs' Proposal**

5                 In their final argument, Plaintiffs' propose they be allowed to proceed at trial using only  
 6 their first name and last initial, while continuing to seal other potentially identifying  
 7 information. This is no different than proceeding anonymously. Plaintiffs recognize the  
 8 heightened public interest at trial [Pls. MIL No. 9 at 3:21-22], as trial is the ultimate disposition of  
 9 any case. They reference the Court's previous orders permitting them to seal portions of the record  
 10 that identified Plaintiffs by name because it was "narrowly tailored" to the needs of the case at that  
 11 juncture. However, none of the discussion or proposals in that section carry Plaintiffs' burden to  
 12 overcome the strong presumption of disclosure at trial. Nor would Plaintiffs' suggestion to limit  
 13 disclosure of full names for jury selection purposes only (followed by a proclamation from the  
 14 Court that the Plaintiffs' full names are thereafter sealed for good) cure many of the problems with  
 15 anonymity at trial. If anything, that approach, in particular the post-jury selection sealing aspect,  
 16 could exacerbate the prejudice to Chart discussed above. Ultimately, Plaintiffs proposal need not  
 17 be considered by the Court because they simply have not established they should be permitted to  
 18 proceed at trial anonymously. Therefore, their motion should be denied.

19                   **III. CONCLUSION**

20                 WHEREFORE, Defendant Chart, Inc. respectfully requests this Honorable Court to deny  
 21 Plaintiffs' Motion *In Limine* No. 9 requesting to proceed at trial anonymously by only using their  
 22 first name and last initial, and for any other relief this Honorable Court may deem equitable and  
 23 just.

24  
 25 Dated: April 15, 2021

Respectfully submitted,

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